RECENT DECISIONS.

AGENCY—RATIFICATION. The defendant, an agent of the plaintiff, made a sale of the plaintiff's land on unauthorized terms. The plaintiff received the price and retained it for two years without complaint and sued the defendant for damages about three years after the sale. *Held*, the plaintiff could not recover, as she failed to prove that she had rescinded the sale. *Lunn* v. *Guthrie* (Iowa, 1902) 88 N. W. 1060.

As a subsequent ratification of an unauthorized act is equivalent to a prior authority and as a ratification for one purpose is a ratification for all, it seems clear that the plaintiff here could not as against the agent treat the sale as made without authority, while upholding it as against the vendee. Acquiescence in the transaction for any length of time, especially if coupled with retention of the benefits arising from it, as in the principal case, amounts to a ratification with regard to the agent as well as to third parties. *Pickett* v. *Pearsons* (1845) 17 Vt. 470; *Bray* v. *Gunn* (1874) 53 Ga. 144. The *dictum* to the contrary in *Triggs* v. *Jones* (1891) 46 Minn. 277 is hardly to be supported.

BAILMENTS—ACTION BY BAILEE—MEASURE OF DAMAGES. In consequence of negligent management, the steamship Winkfield collided with and sunk a vessel engaged in carrying the mails from the Cape to England. Damages having been assessed and paid into court, the Postmaster General presented a claim for the value of the letters and parcels lost with the steamer. The other claimants contested this demand, contending that he was entitled to no relief, because, as representing the Crown, he was not liable over to the owners of the property. *Held*, the Postmaster General could claim for the full value of the mail matter lost. *Claridge* v. *S. S. Tramway Co.* [1892] 1 Q.B. 422, overruled. *The Winkfield* [1902] P. 42 (C. A.). See NOTES, p. 324.

CARRIERS—LIMITATION OF LIABILITY—STOPPAGE IN TRANSITU. Where a consignor, who had shipped goods under an express-receipt limiting liability in every case to fifty dollars, gave notice to the carrier to stop the goods *in transitu*, but the carrier nevertheless negligently delivered to the consignee, it was *held* that the limitation did not protect the carrier. *Rosenthal* v. *Weir* (N. Y. 1902) 63 N. E. 65. See NOTES, p. 330.

CARRIERS—TICKETS—EJECTION FROM TRAIN. The plaintiff purchased a regular ticket of three coupons on being assured by the selling agent of his right to stop off on the route of the second coupon. This coupon was taken up over his objections. Having stopped off, he boarded a subsequent train with only the third coupon and was forcibly ejected on refusing to pay the fare for the remainder of the second division, the conductor acting under telegraphic instructions. *Held*, an action in tort would lie to recover damages for the ejection. *Scofield* v. *Penn. Co.* (1902) 112 Fed. 855.

The case bears close resemblance to *Railroad Co.* v. *Winter* (1891) 143 U. S. 60, holding that the ordinary ticket is merely evidence of the contract and that recovery lies for the ejection, as well as for the breach of contract in refusing the right of stop-over. The former of these propositions is well settled law. See 1 COLUMBIA LAW REVIEW 553. Judicial assent to the latter is not unreserved. *Murdock* v. *Ry. Co.* (1884) 137 Mass. 293, is a leading authority for distinguishing between cases where the passenger presents manifestly insufficient evidence of his contract and those where the evidence is inadequate only in the light of private regulations of the company. In the latter class alone is one within his rights in refusing to pay a second time. Hutchinson on Carriers, 2d ed., § 580 *i*. The late de-

cisions show a tendency to observe this distinction. 4 Am. and Eng. R. R. Cas. (N. S.) 518. The principal case recognizes, but holds it inapplicable because the ejection was by express order of the company. The effect given to this fact seems in harmony with the reason of the distinction, that only the circumstances of his position justify the conductor in acting upon the terms of the ticket.

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS TO THE COURTS. The Code of North Dakota empowered the district court to decree, on petition of parties interested, that territory be excluded from the corporate limits of cities, it appearing to the court that such exclusion was just and proper. *Held*, the act was unconstitutional as a delegation of legislative power to the court. *Glaspell* v. *City of Jamestown* (N. D. 1902) 88 N. W. 1023.

General statutes of this kind giving courts discretionary powers in incorporating and changing the boundaries of cities have often been declared void. *Galesburg* v. *Hawkinson* (1874) 75 Ill. 152; *In re North Milwaukee* (1896) 93 Wis. 616. A number of similar statutes however have been upheld. *Wahoo* v. *Dickinson* (1888) 23 Neb. 426; *Ford* v. *North Des Moines* (1890) 80 Iowa 626. The test generally laid down is whether the court is itself to pass upon the expediency of the proposed incorporation, or only to determine facts and conditions upon which the operation of a given statute depends. The conflict in the decisions arises in the application of this test to each statute.

CONSTITUTIONAL LAW—EMINENT DOMAIN. By statute the court was authorized to allow the petitioner in a condemnation proceeding, upon his giving bond, to enter upon the land and make improvements while the proceeding was pending. *Held*, as the title to the land did not pass until the suit was decided and compensation paid, there was no taking of property without just compensation. *Salt Lake City Water and Electrical Power Co. et al* v. *City of Salt Lake City* (Utah, 1902) 67 Pac. 791.

This decision which follows *Cherokee Nation* v. *Southern Kansas Ry.* (1889) 135 U. S. 641, seems to be erroneous in its theory. The owner was deprived of his property to the extent that he was deprived of the exclusive use of it; and if actual payment is a condition precedent to appropriation under the Utah constitution the decision seems to be wrong. The case may be supported, however, on the ground that the legislature delegated the power to decide the necessity of the appropriation in so far as property was taken in making the improvements. The owner has no absolute right to a hearing on the question of necessity, and the method of deciding the necessity is regulated by the legislature. *Boom Co.* v. *Patterson* (1878) 98 U. S. 403. The requirements of the fourteenth amendment are satisfied so long as a method for obtaining just compensation is provided. *C. B. & Q. Ry.* v. *Chicago* (1896) 166 U. S. 226.

CONSTITUTIONAL LAW—EMINENT DOMAIN—COMPENSATION. Lots in a tract of land were conveyed by deeds prohibiting their use for slaughter houses, smithies, saloons, etc., and certain of such lots were condemned by the United States government for purposes of fortification. *Held*, this condemnation, although depriving the adjoining owner of his rights under these restrictions, did not constitute such a taking of property as entitled him to compensation. *United States* v. *Certain Lands* (1902) 112 Fed. 622. See NOTES, p. 333.

CONSTITUTIONAL LAW — POLICE POWER — DELEGATION OF LEGISLATIVE POWERS. A California statute provided that, when it appeared to the commissioner of labor statistics that inhalation of dust and injurious gases in factories by employees could be prevented by the use of any mechanical contrivance, he should direct that the same be provided. Failure to comply was made a misdemeanor. *Held*, the act was unconstitutional in that it conferred legislative power on the commissioner. *Schaezlein* v. *Cabaniss* (Cal. 1902) 67 Pac. 755.

When a State in the exercise of its police power to make reasonable health regulations delegates its legislative functions to and places arbitrary powers in the hands of individuals, it ceases to be a mere regulation and is void. *Mayor etc.* v. *Radecke* (1878) 49 Md. 217; *Yick Wo* v. *Hopkins* (1885) 118 U. S. 356. The decisions last cited declared void a San Francisco ordinance making the operation of a laundry in any wooden building without the consent and license of the board of supervisors a misdemeanor. In New York the contrary result was reached where a statute required tenement owners to furnish a sufficient water supply on each floor when and in the manner directed by the board of health, failure to comply being criminal. *Health Dep't* v. *Rector, etc. of Trinity* (1895) 145 N. Y. 32. The decision in the principal case is interesting as an interpretation of a doubtful statute.

CORPORATIONS — LIABILITY OF STOCKHOLDERS — RIGHTS OF CREDITORS. The plaintiff rendered professional services to a corporation. At the time of the completion of his services certain stockholders of the corporation had not fully paid for their shares. The corporation having become insolvent, the plaintiff brought an action in equity against these stockholders to enforce his claim. *Held*, construing §§ 1790, 1791, 1792 of the Code of Civil Procedure, the action of the plaintiff inured to the benefit of all creditors of the corporation similarly situated, and therefore, the judgment should provide for an accounting and an equal distribution of the funds secured by the judgment in the payment of all. *Hallett* v. *Metropolitan Messenger Company* (1902) 69 App. Div. 258.

Although the plaintiff might have recovered from these defendants at law without regard to other creditors, *Weeks* v. *Love* (1872) 50 N. Y. 568, his doing so might have worked a hardship, if not an injustice, on them; and they might have restrained him by an equitable action until a judgment for an accounting had been rendered and a distribution made among all creditors alike. *Fohl* v. *Simpson* (1878) 74 N. Y. 137. But having brought his action in equity, it would seem to follow that he should obtain relief only upon complying with the equitable rule of equality as provided for by this decree. The sections of the code above referred to clearly sustain the position taken by the court.

CRIMINAL LAW—PENAL CODE—COMMITMENT WARRANT, *Held*, (GRAY, J., dissenting) a commitment warrant, containing no description of the crime charged beyond the statement that the prisoner was accused of violating § 351 of the Penal Code, was void. *People ex rel. Allen* v. *Hagan* (1902) 170 N. Y. 46.

The section touching "pool selling, book-making, bets, etc.," contains "some fifteen different acts which may be offences against it," and provides that none of these acts shall be a crime if the law elsewhere provides for it an exclusive penalty. Under a similar statute and warrant, a like conclusion has been reached. *State ex rel. Lewis* v. *Arnault* (1898) 50 La. Ann. 1. At common law, as well as by the Code Crim. Proc. § 214, the warrant must contain a reasonable description of the crime charged, though it need not be described with the minuteness of an indictment. *Ex Parte Burford* (1806) 3 Cranch 448; *Hewett* v. *Newburger* (1894) 141 N. Y. 538. Such words as convey a definite idea of the crime charged suffice, as "murder," *U. S.* v. *Martin* (1883) 17 Fed. 150; "grand larceny in the 3rd degree," *People* v. *Johnson* (1888) 110 N. Y. 134; "treason," 2 Hawk. P. C. 119. It is clear that in the principal case no such idea could be conveyed by the warrant.

EQUITY—SPECIFIC PERFORMANCE—INJUNCTION. The plaintiff took a lease of a plot of land and assigned it to the defendant. There was an agreement that a building was to be erected, containing a store, built according to certain specifications, which the plaintiff furnished. *Held*, the plaintiff was entitled to an injunction *pendente lite*, forbidding the construction of the building according to a different plan. *Backes* v. *Curran* (1902) 74 N. Y. Supp. 723.

The court recognizes the fact that the plaintiff is in effect obtaining the same relief that he would get by a decree of specific performance,

admitting, at the same time, that no such decree could be granted. Furthermore, there is no negative covenant in the agreement. The case follows the New York decisions, *Duff* v. *Russell* (1892) 133 N. Y. 678; *Standard Fashion Co.* v. *Siegel-Cooper Co.* (1898) 157 N. Y. 60, but is wrong in principle and opposed to the English view. See 2 COLUMBIA LAW REVIEW, 162.

EVIDENCE—ATTEMPT TO INCRIMINATE DEFENDANT. In an action for malicious prosecution the plaintiff offered evidence tending to show that the defendant prosecuted the plaintiff in revenge for the plaintiff's failure to give perjured testimony. *Held*, the evidence was admissible. *Higlister* v. *French* (Mass. 1902) 62 N. E. 264.

Since the plaintiff, as a matter of fact, did not give the perjured testimony which the defendant solicited him to give, it would seem that the defendant did not commit the crime of subornation of perjury. Bishop, New Crim. Law, 8th ed. § 1197, 2. Since, however, an attempt to commit this crime is a crime in itself, *id.* § 1197, 3, the principle involved in the case is the same as if the crime alleged had been committed. The evidence was received under what was regarded as a general rule that evidence of acts of a defendant that are relevant to the point in issue are not rendered incompetent by the mere fact that the acts are criminal. This seems to be the rule in Massachusetts. See *Commonwealth* v. *Robinson* (1888) 148 Mass. 571. But since authorities hold that in general such evidence is inadmissible, it would seem to be better to admit the evidence as coming within one of those exceptions to this rule which are universally recognized. 2 COLUMBIA LAW REVIEW, 39–43.

EVIDENCE—HEARSAY—DYING DECLARATIONS. In a trial for murder, the State wished to put in evidence, a paper written by the deceased while in possession of all of his faculties and while believing that he would recover. This paper he intended to sign only in case of impending death and, did in fact so sign it when he knew he was about to die. *Held*, it was inadmissible as a dying declaration. *Harper* v. *State* (Miss. 1902) 31 So. 195.

"The principle on which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath." *The King* v. *Drummond* (1784) Leach, 337. If, in the principal case, the declarant signed his statement, fully realizing its effect and after reading it over understandingly, it would seem that the decision cannot be sustained. The fact that it was a reiteration of a former statement should add to its weight. But if, on the other hand, the act of the declarant, in signing the statement, was done without realizing its meaning and at a time when the declarant was no longer in possession of his faculties, the holding is correct. The report of the case is brief and the facts are not set out at sufficient length to enable the reader to determine the mental state of the declarant.

INSURANCE—RESTRICTIONS UPON LIABILITY FOR THE AGENT'S ACTS. An application for life insurance contained an agreement that no information received by the medical examiner should be binding on the company and that the one writing in the answers and statements should be the agent of the insured. These were made warranties of the policy. Correct answers were given the medical examiner, who either failed to enter them or negligently made false entries. *Held*, the company was liable on the ground of public policy and for the reason that the existence of the relation of principal and agent between the company and the examiner could not be changed by an agreement between the insurer and the assured. *Sternaman* v. *Metropolitan Life Ins. Co.* (N. Y. 1902) 62 N. E. 762. See NOTES, p. 326.

MORTGAGES—COVENANT IN RESTRAINT OF REDEMPTION. The plaintiff, holding a public house under a lease expiring in 1923, borrowed a certain sum from the defendants in 1897, and gave them a mortgage of his prem-

ises to secure the loan. In the mortgage deed he covenanted, to the intent that the obligation should run with the land, that, whether any principal or interest should or should not be owing on the security, he would neither use nor sell upon the premises, during the continuance of his term, any malt liquors except such as should be *bona fide* purchased by him of the mortgagees. *Held*, the covenant was a "clog" on the plaintiffs' equity of redemption, and therefore void. *Noakes & Co., Limited* v. *Rice* [1902] A. C. 24 H. L. See NOTES, p. 331.

PLEADING AND PRACTICE—CAUSE OF ACTION. The plaintiff collided with an obstruction negligently left in the road by the defendant, and his person and carriage were injured. The plaintiff brought suit for his personal injuries, and, while such suit was pending, recovered in a lower court for the injury to his carriage. *Held*, the injuries to the person and to the property constituted separate causes of action and a recovery for one was not a bar to the other. *Sicilian Asphalt Paving Co.* v. *Reilly* (N. Y. 1902) 62 N. E. 772.

The theory of the principal case is that a cause of action consists of a violation of a primary right and there are as many causes of action as there are primary rights violated *Brunsden* v. *Humphrey* (1884) L. R. 14 Q. B. D. 141; *Watson* v. *Texas & Pac. Ry.* (1894) 8 Tex. Civ. App. 144. The great weight of American authority is that the injury is the cause of action and the nature and number of rights violated as a result of the act give rise to different items of damage, but that only one cause of action arises from a single injury. *King* v. *C. M. & St. P. Ry.* (1900) 77 Minn. 104; *Braithwaite* v. *Hall* (1897) 168 Mass. 38. The technical reasoning of the theory in the principal case cannot be refuted unless the court will recognize a more comprehensive right than the right of person or the right of property, which will include both of those rights and consider this larger right the primary right. The court refused to follow the doctrine announced in *Howe* v. *Peckham* (1851) 10 Barb. 656

PLEADING AND PRACTICE—PLEA IN ABATEMENT. In an action brought to recover the purchase price of goods the plaintiff had been defeated. Pending his appeal he instituted proceedings to recover the goods. *Held*, a plea in abatement was inadmissible. *McCormick* v. *Gross* (Cal. 1902) 67 Pac. 766.

A plea in abatement that another suit is pending has no application to the case. *Morris* v. *Rexford* (1859) 18 N. Y. 552. The defendant might have moved to stay proceedings until the appeal was decided. Or since an action is considered pending until its final determination upon appeal (Cal. Code Civ. Proc. § 1049) the question of election of remedies might have been raised. *Terry* v. *Munger* (1890) 121 N. Y. 161.

PLEADING AND PRACTICE—REAL PARTY IN INTEREST. The plaintiff held a written assignment of an itemized account. By a contemporaneous oral agreement he had promised to pay the full amount thereof, when collected, to his assignor. *Held*, he was not the real party in interest and could not maintain an action. *Stewart* v. *Price* (Kan. 1902) 67 Pac. 553. See NOTES, p. 328.

PLEADING AND PRACTICE—RES JUDICATA—COLLATERAL ATTACK ON JUDGMENT. In an action on a judgment obtained in another State the defendant's answer set up that the judgment had been obtained by the collusion of the plaintiffs with the defendant's attorney. *Held*, such a defence was a collateral attack on the judgment and therefore inadmissible. *Harter* v. *Shull* (Colo. 1902) 67 Pac. 911.

A domestic judgment cannot, in most jurisdictions, be attacked in any collateral proceeding on the ground of fraud. *Krekeler* v. *Ritter* (1875) 62 N. Y. 372; *contra*, *Phelps* v. *Benson* (1894) 161 Pa. 418. Under Art. 4, sec. 1 of the Federal Constitution, as interpreted in *Mills* v. *Duryea* (1813) 7 Cranch, 481, judgments of other States are, as regards matters of procedure, placed on much the same plane as domestic judgments; and it is reasonable therefore that they should likewise be exempt from collateral attack for fraud. *Christmas* v. *Russell* (1866) 5 Wall. 290; *Ambler*

v. *Whipple* (1891) 139 Ill. 311. But some courts of equity will enjoin a suit on a fraudulent judgment, *Dobson* v. *Pearce* (1854) 12 N. Y. 156; *Davis* v. *Headley* (1871) 22 N. J. Eq. 115, and when equitable defences are allowed in such jurisdictions a plea of fraud will be held good. *Rogers* v. *Gwinn* (1866) 21 Iowa 58. In other cases it has been laid down as a general doctrine that a judgment of another State is impeachable for fraud. *Coffee* v. *Neely* (1871) 2 Heisk. 304.

REAL PROPERTY—CO-TENANTS—ADVERSE TITLE. The plaintiff's assignor was tenant in common of a mining claim X with the defendants, and upon discovering that the apex of the vein of this claim lay within claim Y, purchased part of the latter and transferred it to the plaintiff, a purchaser for value with notice, who, having subsequently acquired the remainder of claim Y, sued the defendants for the value of the ore mined in claim X and for an injunction. *Held*, the purchase of the adverse title or claim inured to the benefit and protection of the common property and such title was held in trust for the other co-tenants, if they, in a reasonable time, claimed the benefit thereof by payment or offer to pay their proportion of the purchase price. *Cedar Cañon Mining Co.* v. *Yarwood* (Wash. 1902) 67 Pac. 749.

The owner of a mining claim has title to all veins or lodes, the apex or top of which lies within the surface lines, and he may follow these veins outside of the side lines extended vertically "between vertical planes drawn downward through the end lines." § 2324 U. S. Rev. Stat. (1872); *Iron Silver Mining Co.* v. *Elgin Mining Co.* (1886) 118 U. S. 196. A co-tenant by purchasing a title or claim adverse to the common property cannot assert such against the other tenants in common. *Freeman on Co-tenants*, § 154; *Downer* v. *Smith* (1866) 38 Vt. 464; *Boyd* v. *Boyd* (1898) 176 Ill. 40. Such title is held in trust for the other co-tenants if they, in a reasonable time, claim the benefit of the purchase by payment or offer to pay their proportion of the purchase price. *Titsworth* v. *Stout* (1868) 49 Ill. 78; *Keller* v. *Auble* (1868) 58 Pa. St. 410.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND—RE-ASSIGNMENT. The plaintiffs' testator and the assignors of the defendants made a lease containing covenants that the lessees * * * and assigns would not assign the lease without the written consent of the lessor * * * and assigns. The lease with the consent of the lessor was assigned to the defendant who was about to re-assign to the original lessee. The plaintiff sought to restrain the defendant by an injunction. *Held*, an injunction would lie, as this covenant ran with the land and a re-assignment to the former lessee would constitute a breach. *McEacham* v. *Colten et al.* (1902) 170 N. Y.

Covenants not to assign without consent of the lessor run with the land. 2 Woodfall, Landlord and Tenant 656; *Williams* v. *Earle* (1868) 9 B. & S. 740. But such covenants are not regarded with favor by the courts and are construed most strongly against the lessor. 1 Taylor, Landlord and Tenant, 350. In some jurisdictions where the lessor's consent to the original lessee is regarded as continuing the lease may be re-assigned to him without the lessor's consent. *McCormick* v. *Stowell* (1885) 138 Mass. 431. This last doctrine was expressly repudiated by the court in the principal case which is to be supported on principle, since in many cases the lessor, to prevent hardship, would expressly refuse to consent to the original lessee as tenant.

REAL PROPERTY—SURFACE WATER. On the lower line of a lot sloping to the adjoining street, the defendant built a retaining wall for a house, in which at intervals were "weep holes" for the escape of surface water, which previously had flowed from the lot equally upon every part of the adjoining area of the street. It was diverted by the "weep holes" to certain parts only of the street, where it froze. The plaintiff, lawfully on the street, slipped upon the ice and was injured. *Held*, (5 dissenting) she could not recover. *Jessup* v. *Bamford Bros. Co.* (N. J. 1902) 51 Atl. 147.

In jurisdictions not adopting the civil law right of drainage, *Garland* v. *Aurin* (1899) 103 Tenn. 555, one may lawfully prevent surface water from coming upon his land. *Barkley* v. *Wilcox* (1881) 86 N. Y. 140; *Baltzeger* v. *Ry.* (1898) 54 S. C. 242. An exception seems to exist in the case of railway embankments. *Ry.* v. *Hackett* (1898) 87 Md. 224. But to change the course of surface water, *after allowing it to enter one's land*, is a tort. *Adams* v. *Walker* (1867) 34 Conn. 351. In *Bowlsby* v. *Speer* (1865) 31 N. J. L. 351, relied on by the court, it does not appear whether the diversion was by *repulsion* or after the surface water had entered the defendant's close; and it is conceived that the dissenting opinion more nearly accords with the distinction taken by VAN FLEET, V. C., in *Miller* v. *Morristown* (1890) 47 N. J. Eq. 62 and 48 *id.* 645. An exception is made where the defendant merely restores his land to its former natural condition. *Gannon* v. *Hargadon* (1866) 10 Allen, 106; *Ry.* v. *Windham* (1899) 126 Ala. 552, *contra*. *Mizell* v. *McGowan* (1897) 120 N. C. 134, is in accord with the principal case.

SALES—INTEREST IN LAND—REVOCATION OF LICENSE. The plaintiffs' intestate had contracted orally to sell to the defendants certain trees then growing on his land, the defendants to have the right to enter and cut the trees within five years thereafter. Before the defendants paid any part of the purchase price, the plaintiffs brought suit to enjoin them from cutting the trees. *Held*, the contract was for the sale of an interest in land and therefore passed no title and was invalid under the statute of frauds, and, as the license given to defendants to enter was revocable, the plaintiffs were entitled to an injunction. *Garner* v. *Mahoney* (Iowa, 1902) 88 N. W. 828.

A sale of growing trees is a sale of an interest in land according to American authorities. *Green* v. *Armstrong* (1845) 1 Denio, 550. The cases *contra*, such as *Claflin* v. *Carpenter* (1842) 4 Metc. 580; *Leonard* v. *Medford* (1897) 85 Md. 666, may be reduced to the distinction laid down in the English case of *Marshall* v. *Green* (1875) 1 C. P. D. 35, that a sale of trees to be severed before deriving further subsistence from the soil is to be treated as a contract to sell a chattel, and so not necessarily within the statute of frauds. On either of the above suppositions a parol sale of trees conveys no present interest in them and a license to enter upon the land and cut them is revocable at any time before it is acted upon as it is not connected with any property right. *Drake* v. *Wells* (1865) 11 Allen, 141; *Owens* v. *Lewis* (1874) 46 Ind. 488; *Fletcher* v. *Livingston* (1891) 153 Mass. 388. The principal case, being a suit to enjoin a trespass, would seem to be correctly decided.

SALES—WARRANTY—OPTION OF EXCHANGE. The defendant sold seed oats to the plaintiff, guaranteeing to refill the order free of charge, if the seeds were not "fresh * * * true to name." The plaintiff after a reasonable inspection planted the seeds and upon discovering that they contained a mixture of wild mustard, brought this action for breach of warranty of quality. *Held*, the warranty to refill the order precluded any warranty of quality and no engagement for quality could survive acceptance. *Bell* v. *Mills* (1902) 170 N. Y.

The first ground of this decision does not follow the general current of authority. An express warranty does not include any implied one unless inconsistent. *Carlton* v. *Lombard, Ayers & Co.* (1896) 149 N. Y. 137. A warranty to take back articles not conforming to the sale contract and to give others, in the absence of express language or necessary implication, does not prevent or render inconsistent an express or implied warranty of quality. *Shupe* v. *Collender* (1888) 56 Conn. 489. The second part of the decision represents the New York doctrine. *Copley Iron Co.* v. *Pope* (1888) 108 N. Y. 232. But upon principle and authority the better view is that mere acceptance does not destroy the seller's engagement for quality. *Polhemus* v. *Heiman* (1873) 45 Cal. 573; *Gilmore* v. *Williams* (1894) 162 Mass. 357.

STATUTES—LIMITATIONS UPON JUDGMENT CREDITOR'S BILL. Where a judgment became outlawed pending the determination of a creditor's bill, it

was *held* that the latter should be dismissed. *Miller* v. *Melone* (Okl. 1901) 67 Pac. 479.

The reason of the decision and the authorities on the point are stated in *McAfee* v. *Reynolds* (1891) 130 Ind. 33. For the purposes of the decision a creditor's bill is merely an equitable levy. It is therefore clear that if a levy at law would not prevent the running of the statute, *Wells* v. *Bower et al.* (1890) 126 Ind. 115, the same result would be reached in equity. This argument is further strengthened by the fact that the lien of a judgment is statutory and where the legislature expressly limits the duration of such lien, the courts cannot extend it. *McAfee* v. *Reynolds*, *supra*. The question is not important in New York and could apparently never arise. See § 1377 Code Civ. Proc.

TAXATION—PURCHASE UNDER TAX SALE. The plaintiff was forced to admit the illegality of a tax-deed upon which he was suing the owner of the land in ejectment. He then claimed a judgment lien on the property for the taxes he had paid. *Held*, he was entitled to that amount. *Standard Inv. Co.* v. *Freeman* (Kan. 1902) 67 Pac. 859.

At common law the doctrine of *caveat emptor* is applied in its fullest extent to tax sales. As in judicial sales, there is no warranty. *Simpson* v. *Edmiston* (1884) 23 W. Va. 675. Everywhere the state, by express statute, is given a lien for unpaid taxes. Some authorities ascribe this power to the sovereign as an inherent right although it was unknown in the ancient land system. Blackwell, Tax Titles, 646. But all agree that legislative sanction is necessary to transfer this privilege to the purchaser under tax sales, and statutes to that effect are not uncommon. Kan. Laws 1876, ch. 34 § 142, applied in *Fairbanks* v. *Williams* (1880) 24 Kan. 16, which was an unsuccessful action of ejectment by the holder of the tax-title. The application of this rule clearly does not prejudice the rights of the owner since his remedies to remove cloud on title are always subject to payment of past taxes as a condition precedent to equitable action in his favor. *Gage* v. *Caraher* (1888) 125 Ill. 447.

TORTS—MASTER AND SERVANT—DISOBEDIENCE OF ORDERS—PROXIMATE CAUSE. The plaintiff's intestate was a brakeman on the defendant's railway. The conductor had given him orders to ride in a given place on the train. At the time of the accident the intestate had come down from train and was walking beside the track, when he was killed by the falling of a log which the defendant had negligently piled on the car. *Held*, there could be no recovery. *Green* v. *Brainerd & N. M. Ry. Co.* (Minn. 1902) 88 N. W. 975.

The rule was not intended for the safety of the brakeman. The court seems to have regarded disobedience of orders as negligence *per se*. But negligence presupposes a duty of taking care and this presupposes knowledge or its legal equivalent. The correct test is stated in the case of *Smithwick* v. *Hall & Tepson Co.* (1890) 59 Conn. 269, which involved facts raising this precise point. There the court said that the negligent act or omission of the party injured must operate as a proximate cause or one of the proximate causes and not merely as a condition. See also *Ford* v. *Fitchburg R. R.* (1872) 110 Mass. 240.

TORTS—MASTER AND SERVANT—RELEASE. *Held*, a contract whereby, in consideration of the defendant's employing the decedent, his next of kin released the defendant from all liability for the death of the decedent through the defendant's negligence, should such occur, was void. *Tarbell* v. *Rutland R. R.* (Vt. 1901) 51 Atl. 6.

It has been suggested that such a contract is void as a fraud upon the statute creating liability for death by wrongful act. The court, however, put its decision upon the ground of public policy, and upon a local statute making the negligence of a railway, whereby human life is lost, a misdemeanor. Considering this case only on the broader ground, attention may be called to the validity of such contracts as exempting from liability under the Employers' Liability Acts. In England such agreements are upheld. *Griffiths* v. *Earl of Derby* (1882) L. R. 9 Q. B.

D. 357. In other jurisdictions they are repudiated, *K. P. R. R.* v. *Peavy* (1883) 29 Kas. 169; while in New York, where a railway can exempt itself from the liability of a carrier of passengers, *Bissell* v. *R. R. Co.* (1862) 25 N. Y. 442, and *à fortiori*, it should follow, from liability to an employeé, *R. R.* v. *Bishop* (1873) 50 Ga. 465, such contracts cannot protect from the consequences of the local Employers' Liability Acts. *Simpson* v. *Rubber Co.* (1894) 80 Hun, 413; *Purdy* v. *Ry.* (1891) 125 N. Y. 209, *semble*.

TRUSTS—CLAIMS OF CREDITORS—DEFAULTING TRUSTEE. Trustees had carried on a testator's business after his death under a power in the will, and one of them had defaulted. *Held*, the creditors of the business were not, because of such default, precluded from their right to be paid out of the trust estate by virtue of the trustees' right of indemnity in respect of debts properly incurred by them in carrying on the business. *In re Frith* [1902] 1 Ch. 342.

While the right of creditors of a business carried on by trustees to claim against the trust estate after having unsuccessfully pursued their remedies against the trustees, or in case of the latter's insolvency, has long been recognized, the precise nature of that right seems not to have been determined in England until the case of *In re Johnson* (1880) 15 Ch. D. 548, where JESSEL, M. R., held that the right was one of subrogation to the trustees' rights of indemnity. Hence, if a trustee be in arrears to the estate the creditor claiming through him gets nothing. And this doctrine has met with the approval of the House of Lords. *Dowse* v. *Gorton* [1891] A. C. 190. But where one or more of the trustees have clear accounts, there seems to be nothing to prevent the creditors from obtaining relief from the trust estate. The principal case appears to be one of first impression so far as the application of the principle to such a state of facts is concerned. In the United States the doctrine of *In re Johnson*, *supra*, prevails, save in the two or three States which give creditors an independent right, without regard to the faithfulness of the trustee. *Wylly* v. *Collins* (1850) 9 Ga. 223; *Manderson's Appeal* (1886) 113 Pa. St. 631. The latter view seems to have much to commend it; in the earlier cases the benefit and necessity of the goods or services were alone discussed and the state of accounts not looked into. For an interesting treatment of this question, see (1881) 15 Am. L. Rev. 449.

WILLS—ATTORNEY'S LIEN. An attorney who drew a will and performed other legal services for a testator, retained possession of the will and refused to surrender it until his account for such services should be paid. *Held*, he could be compelled to produce the will. *In re Bracher's Will* (N. J. 1901) 51 Atl. 63.

While decisions upon this point are extremely rare, such judicial opinion as has been expressed favors the exclusion of testamentary instruments from the operation of the general rule which subjects all papers in an attorney's hands to a general lien for services performed. In *Georges* v. *Georges* (1811) 18 Ves. 294, Lord ELDON says he never heard of a lien upon a will and denies the attorney's right after adverting to the inconvenience which he thought would result from a contrary holding. And this judge held to the same effect in the case of *Balch* v. *Symes* (1823) 1 Turn. & Russ. 87. *Ex parte Law* (1834) 2 A. & E. 45, the only other case found which deals with the question, contains *dicta* in accord.